



**WIRELESS RECOGNITION  
TECHNOLOGIES LLC,**

**Plaintiff,**

**vs.**

**NOKIA CORPORATION and RICOH  
COMPANY, LTD.,**

**Defendants.**

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Civil No. 2:10-CV-00578-DF

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**DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR  
CROSS-MOTION TO SEVER PURSUANT TO RULES 20 AND 21  
OF THE FEDERAL RULES OF CIVIL PROCEDURE**

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. INTRODUCTION .....	1
II. ARGUMENT .....	1
A. Congress Recently Clarified The Correct Application Of Rule 20 In The Circumstances Presented By Defendants’ Motion .....	1
B. The Authority Cited By WRT Was Expressly Abrogated By Congress And Addressed Circumstances Different Than Those Here.....	3
C. WRT’s Argument That This Court Should Ignore Congress’s Clear Mandate Is Nonsensical And Misapprehends The Legislative History Underlying Rule 20.....	5
III. CONCLUSION.....	5

## **I. INTRODUCTION**

In its Opposition to Defendants’ Cross-Motion to Sever Pursuant to Rules 20 and 21 of the Federal Rules of Civil Procedure (“Opposition”), plaintiff WRT<sup>1</sup> argues that all four cases should be joined for trial because Defendants’ alleged acts of infringement “arise out of the same transaction or occurrence.” In making this argument, WRT ignores recent unequivocal pronouncements from Congress and urges the Court to follow reasoning and case law that Congress specifically abrogated in enacting the America Invents Act. Rather than contravene a recent Congressional mandate, the Court should sever the cases for trial along the lines requested by Defendants.

## **II. ARGUMENT**

### **A. Congress Recently Clarified The Correct Application Of Rule 20 In The Circumstances Presented By Defendants’ Motion**

Rule 20 permits two or more defendants to be joined in a single action only if the plaintiff’s alleged rights to relief “arise out of the same transaction [or] occurrence” and a question of fact common to all defendants will arise in the action. Fed. R. Civ. P. 20(a)(2). WRT’s argument in favor of trial consolidation is premised on the belief that this standard permits patent infringement actions against unrelated defendants with different accused products to be joined in a single trial unless the defendants can show that the accused products are “dramatically different” from one another. Congress recently left no doubt that WRT’s belief is mistaken.

In the recently-passed America Invents Act, Congress clarified and made express how Rule 20 applies to attempts to join multiple unrelated defendants with different accused products in the same patent infringement case. *See* H.R. 1249, 112th Cong. (2011). Specifically, Section 19(d) of the Act added a new Section 299 to Title 35 of the U.S. Code governing joinder of parties in patent infringement litigation. New Section 299 clarifies that the “same transaction or

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<sup>1</sup> Unless otherwise indicated, all terms in this Reply shall have the meanings defined in Defendants’ opening brief in support of their cross-motion. (Dkt. No. 103.)

occurrence” requirement of Rule 20(a)(2) must “relat[e] to the making, using, importing into the United States, offering for sale, or selling of *the same accused product or process.*” 35 U.S.C. § 299(a)(1) (emphasis added). In the four cases that WRT seeks to consolidate, WRT is accusing four distinct sets of accused products<sup>2</sup> from four different groups of defendants.<sup>3</sup> Thus, the first prong of the Rule 20(a) test for proper joinder is *not* satisfied under the circumstances present in this motion. Congress has now made clear that, under such circumstances, the cases should be severed exactly as Defendants have suggested in their cross-motion. (*See* Dkt. No. 103 at 11-12.)<sup>4</sup>

Section 299 also changed the second prong of Rule 20(a)(2) to require that there be “questions of *fact* common to all defendants.” *Id.* § 299(a)(2) (*emphasis added*). Common questions of law, such as the scope or proper construction of patent claims, will not suffice to satisfy the second prong of Rule 20(a). Thus, WRT’s reliance upon common questions of claim construction or patent scope to justify its requested consolidation is erroneous.

Finally, with respect to the structure of trials – the issue at the heart of Defendants’ motion – Section 299 states that “accused infringers may not be joined in one action as defendants or counterclaim defendants, or have their actions *consolidated for trial, based solely on allegations that they each have infringed the patent or patents in suit.*” *Id.* § 299(b) (*emphasis added*). Thus, Congress has clearly and unequivocally indicated that Rule 20 *does not permit* the consolidation for trial that WRT requests. Rather, the trials must be organized as Defendants have proposed.

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<sup>2</sup> The four sets of accused products are: (1) A9’s Snaptell product and Amazon’s Remembers and Price Check features; (2) Google’s Goggles and Shopper mobile applications; (3) Nokia’s Point and Find mobile applications, and (4) applications that Ricoh allegedly makes for the iPhone, including French Rev. and DriveTube.

<sup>3</sup> The four different groups of Defendants are: (1) A9 and Amazon; (2) Google; (3) Nokia and Nokia Corporation; and (4) Ricoh and Ricoh Company Ltd.

<sup>4</sup> Despite Congress’s clear directive and in the interests of judicial economy, Defendants have nevertheless offered to consolidate the four cases for some pretrial proceedings. (*See, e.g.*, Dkt. No. 103 at 2-3.)

**B. The Authority Cited By WRT Was Expressly Abrogated By Congress And Addressed Circumstances Different Than Those Here**

WRT argues that Defendants’ alleged acts of infringement “arise out of the same transaction or occurrence” based on a legal standard and case law that Congress recently declared erroneous and abolished. Specifically, WRT argues that patent infringement cases against unrelated accused products may be joined in a single case if they are not “dramatically different” from one another. The argument is based on four cases: (1) *MyMail, Ltd. v. America Online, Inc.*, 223 F.R.D. 455 (E.D. Tex. 2004); (2) *Adrain v. Genetec Inc.*, 2009 WL 3063414 (E.D. Tex. September 22, 2009); (3) *Eolas Technologies, Inc. v. Adobe Systems, Inc.*, 2010 WL 3835762 (E.D. Tex. September 28, 2010); and (4) *Oasis Research v. ADrive, et al.*, Report and Recommendation of United States Magistrate Judge, No. 4:10-cv-435 (E. D. Tex. May 23, 2011). (Dkt. No. 109 at 1-3.) Congress has unequivocally stated that these cases and the “dramatically different” standard that they espouse are erroneous applications of Rule 20.

The House Report on the America Invents Act explains that the purpose of Section 299, which has now become law, was to “address[] problems occasioned by the joinder of defendants . . . who have tenuous connections to the underlying disputes in patent infringement suits.” H.R. Rep. No. 112-98, pt. 1, at 54 (June 1, 2011) (attached as Ex. C). The report explains that “Section 299 legislatively abrogates the construction of Rule 20(a) adopted in *MyMail, Ltd. v. America Online, Inc.*, 223 F.R.D. 455 (E.D. Tex. 2004); . . . *Adrain v. Genetec Inc.*, 2009 WL 3063414 (E.D. Tex. September 22, 2009); . . . and *Eolas Technologies, Inc. v. Adobe Systems, Inc.*, 2010 WL 3835762 (E.D. Tex. September 28, 2010).” (Ex. C at 55 n.61.)<sup>5</sup> The section “effectively conform[s] these courts’ jurisprudence to that followed by a majority of jurisdictions.” (*Id.*) Thus, Congress expressly indicated *by name* that three of the four cases relied upon by WRT misconstrued and misapplied Rule 20(a). Although Congress did not mention by name the fourth case cited by WRT, the magistrate’s recommendation in *Oasis*

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<sup>5</sup> The Merriam-Webster online dictionary defines the term “abrogate” to mean “to abolish by authoritative action.” <http://www.merriam-webster.com/dictionary/abrogate>

*Research*, that case is similarly flawed because it relies entirely on the three cases that Congress disavowed. (*See, e.g.*, Dkt. No. 109, Ex. A at 4.)

Even if Congress had not pronounced them erroneous, the cases relied upon by WRT would be inapposite because the circumstances in each of those cases were materially different than the circumstances in this motion. For example, in *MyMail*, the Court was concerned with the prospect of inconsistent claim constructions emanating from two different courts and favored resolving such issues in the same forum. 233 F.R.D. at 458. The Court in *MyMail* was also concerned with duplicative discovery. *Id.* In *Adrain*, the Court was similarly concerned with having similar issues being decided in “five separate suits scattered across the country.” 2009 WL 3063414 at \*2. In *Eolas*, the Court was concerned with enabling “multiple courts to simultaneously address . . . identical issues” and the possibility of “inconsistent results.” 2010 WL 383762 at \*2. In the Federal Circuit’s unpublished decision denying a writ of mandamus and holding that the trial court’s decision in *Eolas* was not “patently erroneous,” the Federal Circuit based its decision in part on the trial court’s concern with having multiple courts deciding similar issues. *In re Google, Inc., et al.*, 412 Fed. Appx. 295, 296; 2011 WL 772875 at \*2 (C.A. Fed. (Tex.)).<sup>6</sup>

The concerns underlying the decisions in *MyMail*, *Adrain*, and *Eolas* are not present in WRT’s cases. The concern over having multiple forums does not apply because, unlike the circumstances in *MyMail*, *Adrain*, and *Eolas*, all Defendants have joined in the pending motions to transfer. Thus, a single forum – either this Court or the Northern District of California – will handle all of the actions. Moreover, there are no risks of judicial inefficiencies or inconsistent claim constructions because Defendants are amenable to having a single claim construction proceeding and to consolidating much of the pretrial discovery. Thus, the reasoning underlying the decisions in *MyMail*, *Adrain*, and *Eolas* would not apply to Defendants’ cross-motion even if those cases had not been abrogated by Congress.

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<sup>6</sup> All of the decisions cited by WRT were issued before Congress issued the House Report on the America Invents Act.

**C. WRT's Argument That This Court Should Ignore Congress's Clear Mandate Is Nonsensical And Misapprehends The Legislative History Underlying Rule 20**

WRT urges the Court to ignore Congress's clear instructions in adopting the America Invents Act because that legislation was not effective until September 16, 2011 and applies only to actions filed after that date. (Dkt. No. 109 at 3.) Following WRT's suggestion, however, would exalt form over substance and contravene Congress's plain mandate.

As explained in Defendants' cross-motion (Dkt. No. 103 at 8-11), the legislative history of Rule 20 from its inception until the enactment of the America Invents Act makes clear that the recent amendments to Rule 20 were clarifications rather than fundamental changes. The House Report makes clear that the amendments were to cure incorrect applications of Rule 20 in patent cases, including the very line of cases that created and propagated the incorrect joinder that WRT urges upon this Court. In the face of such a clear directive from Congress and in the absence of concerns over having multiple forums decide the same issues, WRT's motion to join all Defendants in a single trial lacks merit.<sup>7</sup> Joining the Defendants in a single trial would risk appeals, reversals, and retrials – a scenario that would be highly inefficient and would serve neither the parties nor the judiciary. Consistent with the Congressional intent reflected in the America Invents Act, this Court should sever the cases for trial along the lines requested by Defendants.

**III. CONCLUSION**

For all of the above reasons, the Court should deny WRT's consolidation motion and grant Defendants' cross-motion to sever the cases for trial.

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<sup>7</sup> Defendants are aware that in *Ganas, LLC v. Sabre Holdings Corp., et al.*, Civil Action No. 2:10-CV-320-DF (attached as Ex. J), this Court acknowledged that recent amendments to Rule 20 were probative of the correct interpretation of existing law. (Ex. J at 15-16.) The Court, however, felt bound to apply the reasoning of *In re Volkswagen of America, Inc.*, 566 F.3d 1349 (Fed. Cir. 2009) that it was not an abuse of discretion to deny motions to sever and transfer when granting such motions would result in multiple cases in multiple districts. *See, e.g., Volkswagen*, 566 F.3d at 1351. As explained above, the reasoning of *Volkswagen* is not relevant here because all Defendants have joined in the transfer motion, and there is only one proposed transferee court. Only one court will handle all of the cases.

Dated: October 28, 2011

Respectfully submitted,

*/s/ Michael C. Smith*

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email, on this 28th day of October, 2011.

*/s/ Michael C. Smith*

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